MICHIGAN
LAW REVIEW

VOL. IV MAY, 1906 NO. 7

THE DOCTRINE OF THE FEDERAL COURTS AS TO THE VALIDITY OF IRREGULAR MUNICIPAL BONDS.

THE power to issue *negotiable* bonds is not identical with the power to become indebted, though usually concomitant with it; for municipal indebtedness may be incurred by the issue of warrants or non-negotiable notes. The power to become indebted is not an inherent power of American municipalities. It is conferred by the state, either expressly, or by implication as being a necessary or reasonable agent in the execution of other powers expressly conferred; and the limits of the doctrine of implication are in dispute. But with the power to become indebted this paper is not concerned. Similarly the power to issue *negotiable* paper is not inherent. It, too, must be conferred either expressly or by implication. It is conferred by implication whenever a city is authorized to incur indebtedness[1] and it appears from the circumstances that mere warrants and non-negotiable notes would not fulfill the intention of the legislature.[2] (In the case of a county or other quasi-corporation power by implication seems to be more limited than in the case of a city.[3]) But we are not concerned, either, with the manner in which power to issue negotiable instruments is conferred. This paper will deal simply with the manner in which the power to issue such bonds is *exercised* and the effect of a non-compliance with the legal restrictions surrounding its exercise.[4]

[1] Rogers *v.* Burlington, 3 Wall. 654 (1865); Ashley *v.* Presque Isle Co., 8 C. C. A. 455 (1893); West Plains Tp. *v.* Sage, 16 C. C. A. 553 (1895).

[2] Merrill *v.* Monticello, 138 U. S. 673 (1891); Hill *v.* Memphis, 134 U. S. 198 (1890); Brenham *v.* Ger. Am. Bk., 144 U. S. 173 (1892).

[3] For a discussion of the creation of the power to borrow money and issue negotiable paper, see Dillon on Municipal Corporations (4th ed.), §§ 117-126, 157, 157a.

[4] The extent of the power of a municipality to bind itself is to be determined by the state court, Wells *v.* Supervisors, 102 U. S. 625 (1881); Claiborne Co. *v.* Brooks, 111 U. S. 400 (1884). But the manner in which this power may be exercised, and hence the whole question of the validity of bonds irregularly issued, is reserved by the federal courts for their own decision, Stanly Co. *v.* Coler, 190 U. S. 437 (1903); Ind. Sch. Dist. of Sioux City *v.* Rew, 49 C. C. A. 198 (1901).

Since the power of public corporations to issue bonds is not inherent but must always arise from some authorization of law, express or implied, what of a bond which, for some reason, fails to comply with the law permitting issuance? Is it wholly void, or may it under some circumstances be enforced?

The cases are agreed that a mere informality in the issuance of a bond may, under certain circumstances, be cured, and, on the other hand, that bonds issued with a total lack of legislative authority are void in any case. But within these limits the cases, state and federal, are in most admired disorder.

Owing to their more favorable attitude toward the holders of municipal securities, the federal courts have been appealed to whenever possible; and it rarely happens that the holders are not able by some means to get their cases into those courts. In matters of commercial law the federal courts refuse to be bound by decisions of the state in which the controversy arose; and regarding irregular bonds they have built up a jurisprudence of their own.[5] The result is that, not only are the federal decisions to all intents and purposes the law of the land, but, owing to their great number, they are susceptible of nicer distinctions than those of any one state. For these reasons any coherent theory must of necessity be based on federal decisions alone. With this unified federal theory the state decisions can then be compared, and their points of similarity or difference noted.

But even the federal decisions have been much misunderstood. Most of the text-books either indulge in vague general statements, or, attempting to analyze deeper, involve themselves in a tangle of complex propositions. Take a few of the leading authorities. Beach[6] says, page 1527, that where the bonds were issued in disregard of some provision of the state constitution, "an estoppel [against the city] may arise in a proper case, upon a recital that an act required by the constitution has been performed, as well as upon a recital of the performance of an act required by statute." On pages 1538-9 he says, "Recitals in bonds issued under legislative authority may estop the holder from disputing their authority as against a bona fide holder for value; but when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds." Daniel on Negotiable Instruments[7] arranges the law of the subject as pronounced by the Supreme Court of the United States into seven propositions, and then continues, "But the effect of its decisions is to qualify these

[5] See note 4.

[6] Modern Law of Contracts (1896).

[7] Fifth Ed., §§ 1537 et seq.

doctrines by a second series of propositions," of which there are three. The result of these ten conflicting statements may, perhaps, be a true statement of the law; but any one of them standing alone is misleading, and to grasp the ten simultaneously is beyond the power of mortal mind. The result is confusion. The discussion in Dillon on Municipal Corporations[8] is most thorough; but when Dillon wrote, the subject had not been adjudicated in all its phases. Subsequent decisions of the United States Supreme Court have overthrown some of his conclusions, notably the assertion that no recitals can estop the city to set up the defence of an over-issue in violation of the state constitution. The recently published Abbott on Municipal Corporations treats the subject superficially. Ingersoll on Public Corporations (1904) contains a fairly accurate, though brief, résumé of the decisions, but does not trace them back to underlying principles.

For this confusion the blame is at the door of the decisions themselves, for the whole subject is of recent growth and the court has but recently found itself. The earliest case is *Knox County* v. *Aspinwall* (1858),[9] followed by perhaps half a dozen before 1870. It is between the years 1870 and 1900 that practically the entire development has taken place. So conflicting are the opinions even in the Supreme Court cases that they might be cited in support of almost any position, and we must consider only the judgments, even disregarding to some extent the essential arguments on which they are based.

In the early development of the Middle West competition between localities and a mad fever of land speculation led to all sorts of schemes for building up the present on the hopes of the future. Municipal bonds were issued in tremendous volume for public buildings and other improvements. Through local aid canals were dug and railways laid down. It was customary for the promoters of a railway to locate the prospective line through those counties and towns which would promise the fattest bonus. Municipal bonds were issued to the road in return for its stock, or were given outright. In many cases, observes MR. JUSTICE MILLER in his dissenting opinion in the case of *Humboldt Township* v. *Long*;[10] the bonded indebtedness exceeded the entire valuation of the taxable property in the municipality. When the time came to pay these obligations the obligees were utterly unable to do so. Worse still, in many cases the hopes upon which they had built had proved illusory, the railroad had failed, or,

[8] Fourth Ed. (1890), §§ 520-535.

[9] 21 How. 539 (1858).

[10] 92 U. S. 642 (1876).

when built, had not brought the expected prosperity. So search was made for some loop-hole through which the municipality might escape payment, and the courts were flooded with litigation. The state courts, naturally, were willing to give the municipality the benefit of the doubt. But the Federal Supreme Court took a firm stand against this veiled repudiation.

The position first taken was what might be called the doctrine of absolute validity. It was stated thus, "When a corporation has power under any circumstances to issue negotiable securities, the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority."[11] This regardless of whether or not recitals of compliance with the authority were made in the bond,[12] though the fact that they were made was sometimes used to give added force to the argument. In support of this position the courts held that the issuing officers were themselves the judges as to whether the conditions and circumstances were such as to authorize the issuance, and that the mere fact of issuance evidenced a determination by them that the circumstances authorizing it existed.[13] The court also argued that the bonds, once issued, were invested with all the characteristics of negotiable paper issued by a private person, and the holder had the right to presume that the statutory conditions had been complied with.[14]

This doctrine was consistently opposed by JUSTICES MILLER, FIELD, and BRADLEY. In 1872 Dillon in his Municipal Corporations[15]

[11] City of Lexington *v.* Butler, 14 Wall. 282 (1871). This decision is the high water mark of the doctrine of absolute validity. It seems to extend the doctrine to cover any and every bond issue, no matter how gravely it may violate the law, provided only there be some power to issue.

[12] The bonds in the cases of Grand Chute *v.* Winegar, 15 Wall. 355 (1872), and Pendleton *v.* Amy, 13 Wall. 297 (1872), were sustained, though they contained no recitals.

[13] "The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription * * * and the ascertainment of that fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. * * * We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power and before the rights of third parties had attached; but after the authority has been executed, the stock subscribed, and the bonds in the hands of bona fide holders, it would be too late, even in a direct proceeding, to call it in question." Knox Co. *v.* Aspinwall, 21 How. 539 (1858). Affirmed by Mercer Co. *v.* Hacket, 1 Wall. 83 (1863); Lynde *v.* Winnebago Co., 16 Wall. 6 (1872); St. Joseph Tp. *v.* Rogers, 16 Wall. 644 (1873); and others. The logical conclusion from this would be that such bonds were unimpeachable even if the holder had actual notice that the facts did not take place as recited; and this was, in fact, held in Moran *v.* Miami Co., 2 Black 722 (1862); and Marion Co. *v.* Clark, 94 U. S. 278 (1877). See also note 75.

[14] The position of these early cases, as understood by those who upheld and those who opposed it, is shown with great clearness by a comparison of the prevailing and dissenting opinions in the cases of Coloma *v.* Eaves, 92 U. S. 484 (1876), and Humboldt Tp. *v.* Long, 92 U. S. 642 (1876).

[15] First Ed., § 418; Fourth Ed., § 523.

protested against "the broad language in some of the opinions to the effect that where under any circumstances the power exists in the corporation to issue negotiable securities, the bona fide holder has the right to presume that they were duly issued," and expressed the hope that the court would modify these dicta. The court did recede from this position somewhat, but only to the extent of requiring that the decision of the issuing officer must be evidenced by some recital on the bond.[16]

The *decisions* in these early cases were correct enough, for in all of them the ground of invalidity was merely a failure to observe some precedent formality, and the court has always held that as to such questions the decision of the officer is absolutely conclusive. But the language of the court would have extended the scope of the doctrine of absolute validity to much graver defects, should situations involving them arise.

Such situations did arise soon. The first was presented in the case of *Marcy* v. *Township of Oswego*,[17] where the amount of the bonds issued exceeded the limit of indebtedness permitted by law. The second was the issuance of bonds for an unauthorized purpose.[18] At the very outset the court made the mistake of trying to apply to such cases the reasoning used in *Knox County* v. *Aspinwall*. The bonds, it said, should be upheld, since the issuing officers are made by law the sole judges of whether conditions precedent have been complied with, the requirements as to excess and purpose are conditions precedent, therefore the recitals of such officers are conclusive upon the corporation. Those who opposed this broad view took the ground, very properly, that there is a vast difference between a recital, for instance, that the order for an election was countersigned by the mayor and a recital that the bonds were within the statutory limit. Should this latter situation be brought within the doctrine of absolute validity it would be possible for officers of a corporation to bind it to pay an issue of bonds several times in excess of the statutory limit, even in the face of actual knowledge of the excess on the part of the purchaser. Feeling that it would be wrong to entrust such large powers to public officers, they fell back on the only argument which occurred to them,—that such bonds were absolutely ultra vires. But how could such be the case when it had been stated again and again that bonds were not ultra vires if the city had

[16] Coloma *v.* Eaves, 92 U. S. 484 (1876). Such a requirement, however, is surely illogical; for if the officer be empowered to make a decision, such a decision is certainly evidenced by the mere fact of issuance. The inconsistency arose from the confusion of the old idea of Knox Co. *v.* Aspinwall with the new doctrine of estoppel.

[17] 92 U. S. 637 (1876).

[18] Pollard *v.* City of Pleasant Hill (C. C.), Fed. Cas. 11,253 (1873).

power under any circumstances to issue them? The whole trouble arose, it would seem, from failure to observe the limits of the doctrine of *Knox County* v. *Aspinwall.* In that case the officers issuing the bonds were made also judges of the election. In the situation presented in *Marcy* v. *Township of Oswego,* and other cases like it, the officers are not judges of anything. They have simply power to make assertions regarding some facts, which assertions may be sufficient to put the holder of the bonds off his guard and relieve him of the necessity of investigating those facts for himself. *In the first instance the recital is by way of a decision, conclusive against all the world; in the second instance the recital is merely an assertion by one in a position to know the truth, and operates merely by way of estoppel.*[19] If the recital be a decision it cannot well be impeached collaterally unless the bond be absolutely ultra vires; but if it be a mere assertion, it would operate merely to estop the city, and the estoppel might be negatived by other equitable considerations, such as constructive knowledge on the part of the purchaser. Equitable considerations are elastic and the courts might confine the operation of the estoppel in any degree which public policy should demand.

Now this latter construction of the recital was the one upon which the court in its later cases instinctively proceeded to act, as we may gather from the results of the next line of cases; though the court was not consciously aware of the departure which it was making. In the case of *Buchanan* v. *Litchfield,*[21] where bonds were issued in excess of the constitutional limitation, and where the bond recited that it was issued "under an act of the General Assembly of the State of Illinois [describing it]," the city was held not to be estopped. The court said, "The purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city." Now it is obvious that if the issuing officers in this case had been made the judges as to whether the conditions governing this issue of bonds had been complied with, then their decision would have established that fact, just as the decision of an election board establishes the result of an election, beyond collateral attack. The purchaser would not have been bound to take notice to the contrary.

[19] Compare Knox Co. *v.* Aspinwall with the opinion of GILBERT, J., in City of Santa Cruz *v.* Waite, discussed in note 39. It is because he does not observe this distinction that Dillon in his fourth edition tries in vain to place a logical limit to the doctrine of ultra vires and finally reaches the conclusion that, if the limit of indebtedness be fixed by the constitution, bonds issued in excess of it are absolutely void,—a conclusion upset within two years by the case of Chaffee Co. *v.* Potter, 142 U. S. 355 (1892).

[21] Buchanan *v.* Litchfield, 102 U. S. 278 (1880).

At any rate the case of *Buchanan* v. *Litchfield* established "constructive knowledge" as one of the elements to be considered in determining the binding power of recitals. Far from clearing up the matter, this but introduced a new element of uncertainty—the circumstances or documents of which the prospective purchaser is obliged to take notice, and the weight which such notice is to have as against express recitals. To make matters worse the old doctrine of ultra vires still clung about the decisions, although, as we shall see, in every case the real rationale was the presence or absence of estoppel. In a series of cases terminating in *Waite* v. *City of Santa Cruz* (1901),[22] the court disposed of one question after another. It is now possible, taking into account the results of these decisions, and disregarding inconsistencies in the arguments, to arrive at a theory of the whole subject.

First, when is a bond absolutely ultra vires, so that it will be invalid in the hands of a bona fide holder even if there are no facts from which he is presumed to have notice of its invalidity? To this there can be but one reply. No issue of bonds is absolutely ultra vires unless the municipality attempting to issue them is totally without power to issue bonds for any purpose or under any circumstances.[23] The court has upheld bonds purporting to be refunding bonds but issued in fact to establish a fund to corrupt the legislature;[24] and bonds purporting to be for a public purpose, but issued in fact to aid a railroad, which had been repeatedly held by the courts of that state to be a private purpose and unlawful;[25] and it

[22] 89 Fed. 619 (C. C.); 39 C. C. A. 106; 184 U. S. 302 (1902).

[23] Ogden *v.* Daviess Co., 102 U. S. 634 (1880), is an example of such absolute invalidity. A statute permitted the inhabitants of a strip ten miles on either side of the prospective track of a railroad to levy a tax to aid the road, upon vote of a majority of the taxpayers residing in the strip, the tax to be levied and collected by the county court. Another act empowered the county court at the request of a *township* to issue railway aid bonds payable by that township. The bonds in suit were issued by the county court in behalf of the inhabitants of one of these strips. Held, the second act did not apply to a "strip," and the first act did not authorize bonds, hence the "strip" had no power to issue any bonds whatever, the debt attempted was of the "strip" and not of the county, therefore the bonds were wholly void. Similar cases of total invalidity are Katzenberger *v.* Aberdeen, 121 U. S. 172 (1887); Coffin *v.* Kearney Co., 6 C. C. A. 288 (1893); Sage *v.* Fargo Tp., 46 C. C. A. 361 (1901).

[24] Pollard *v.* City of Pleasant Hill, Fed. Cas. 11, 253 (1873). The bonds recited that they were refunding bonds issued in pursuance of an act of the General Assembly. "The answer," says the court, "sets up that the bonds were not issued in payment of outstanding warrants, or in satisfaction of liabilities of the city, but that they were issued to raise funds to improperly influence legislation, quoting an ordinance of the city from which it would appear that such was the case. However much we may deprecate that any people should thus expose themselves on their own record * * * it would be but aiding and abetting the wrongful acts to allow them to come and set them up in their own defense against innocent holders of the commercial securities they issued. It is admitted that legal authority to fund the floating debt of the city existed, and that the bonds on their face purported to be issued in compliance with it. This binds the city."

[25] Risley *v.* Village of Howell, 12 C. C. A. 218 (1894).

has upheld bonds issued to an amount far in excess of the debt limit as fixed by the state constitution, on the strength of a recital of compliance with that instrument.[26] These cases are but examples, to each of which the line of federal decisions cited in this paper furnishes parallels in plenty. Conversely, no case is to be found in which recovery has been refused for mere want of power to issue the *particular* bonds in suit. That is, in every case involving bonds of a municipal corporation having *some* power of bonding, in which those bonds were declared invalid, there was present some other factor, such as a defect in the recital,[27] or constructive knowledge on the purchaser's part, which would be sufficient to prevent recovery. Absolute ultra vires, then, can come about only through entire absence of legislative authority to issue bonds.[28]

To this proposition there is a corollary. If the bond, issued for a purpose not authorized by law, recites compliance with a statute which is itself invalid, such recital works no estoppel.[29] To illustrate: a city has power to issue bonds to construct waterworks. Another statute is passed purporting to authorize bonds in aid of an industrial corporation, but such statute is declared void. Bonds which recite "issued in accordance with a statute entitled 'A Statute

[26] Chaffee Co. *v.* Potter; Gunnison Co. *v.* Rollins (both supra).

[27] For example, in Buchanan *v.* Litchfield, 102 U. S. 278 (1880), where bonds issued in excess of the constitutional limit were declared void in the hands of a bona fide holder, the bonds did not recite that they were issued in conformity to the constitution; and the court said, "Had the bonds made the additional recital that they were issued in accordance with the constitution, * * * there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement as to the extent of its existing indebtedness." Similarly in Harshman *v.* Bates Co., 92 U. S. 569 (1876), where the bonds were issued for an unlawful purpose and were not authorized by two-thirds of all the voters, as required by the constitution, the bonds were declared invalid, and the court said, "As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on inquiry, we think that he should not recover."

[28] In Hughes Co. *v.* Livingston, 43 C. C. A. 541 (1900), Judge Sanborn, before whom a very large proportion of the recent cases have come, after a review of a great number of authorities, said, "A municipality or a quasi-municipality may not, by recitals in its bonds, estop itself from denying [asserting] that it is without power to issue them, when the laws are such that there can be no state of facts or conditions under which it would have authority to emit them. But if the laws are such that there might, under any state of facts or circumstances, be lawful power in the municipality or quasi-municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances existed, and that it had lawful power to send them forth, unless the constitution or act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances."

[29] In the following cases the statute relied on in the recital was void: Loan Ass. *v.* Topeka, 20 Wall. 655 (1874); Ger. Sav. Bk. *v.* Franklin Co., 128 U. S. 526 (1888); Amoskeag Bk. *v.* Ottawa, 105 U. S. 667 (1881); Wilkes Co. *v.* Coler, 180 U. S. 506 (1900); same, 190 U. S. 107 (1903); Harshman *v.* Bates Co., 92 U. S. 569 (1876); Kelly *v.* City of Milan, 127 U. S. 139 (1888); Parkersburg *v.* Brown, 106 U. S. 487 (1882); Gilson *v.* Dayton, 123 U. S. 59 (1887); East Oakland Tp. *v.* Skinner, 94 U. S. 255 (1877).

Empowering Cities to Issue Bonds in Aid of Industrial Corporations'" would, it is true, be wholly void; but (and it is this which is overlooked) a recital "issued in accordance with a statute entitled 'A Statute Empowering Cities to Issue Bonds to Construct Waterworks'" would have made those same bonds good in the hands of bona fide holders. It was from cases like this, as well as from the earlier attempts to limit the all-embracing effect of recitals, that the broad dicta regarding ultra vires arose.

The second proposition established by the federal decisions is that where there is a mere informality in some step prior to the issuance of the bond, and the officer issuing the bond is made expressly or impliedly the sole judge as to whether such step has been duly taken, his decision is absolutely conclusive except on an immediate direct attack, and the bonds issued by him are absolutely valid, with or without recitals. This, it will be perceived, is the position taken by the opinions in the earlier cases, modified, however, by being limited to a breach of a mere precedent formality; whereas the earlier opinions had included any defect in the issue, however grave. A defect in the notice of the election to authorize the bonds is thus cured,[30] or irregularities in the negotiations for the floating of the bonds,[31] or lack of the requisite authorization by the grand jury,[32] or the required petition.[33] In recent years the custom of making recitals has become universal; and where such recitals are made, the bonds would be valid at all events by way of estoppel.

It is this question of estoppel which is involved in the great majority of suits to enforce bonds irregularly issued. Under what circumstances and to what extent may bonds, otherwise void for noncompliance with the statutory requirements regarding their issuance, be rendered enforceable in the hands of an innocent holder by a recital on their face that they were issued in conformity with the law? In other words, what is the effect of statements made on the bonds by officers of the municipality which tend to throw the purchaser off his guard as to some cause of invalidity in the bond?

[30] Knox Co. *v.* Aspinwall.

[31] Moran *v.* Miami Co., 2 Black 722 (1862).

[32] Mercer Co. *v.* Hacket, 1 Wall. 83 (1863).

[33] "The county judge unquestionably had jurisdiction to decide upon the application made by the taxpayers. If there were errors, the proceedings should have been brought before a higher court for review by a writ of certiorari. * * * The judgment rendered can no more be collaterally attacked in this case than could any other judgment of a court of competent jurisdiction." Lyons *v.* Munson, 99 U. S. 684 (1879); to the same effect Orleans *v.* Platt, 99 U. S. 676 (1879); and Andes *v.* Ely, 158 U. S. 312 (1895). In Provident Trust Co. *v.* Mercer Co., 170 U. S. 593 (1898), there is the same holding, though that case concerned delivery, not execution.

The elements of equitable estoppel in general are, as stated by Bigelow:[34]

"1. There must have been a false representation or a concealment of material facts.

2. The representation must have been with knowledge, actual or virtual, of the facts.

3. The party to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter.

4. It must have been made with the intention, actual or virtual, that the other party should act upon it.

5. The other party must have been induced to act upon it."

To these there may be added regarding the representations of an agent:[35]

"6. Where an agency really exists, the principal is estopped to deny the truth of the agent's statements, express or tacit, just as much as if he had himself made them, subject to the limitations that would prevail in that case."

It is evident that in every case there are three elements of uncertainty: A—Are the officers making this recital authorized to do so (6), and are they in a position to know the facts (2)? B—Is the recital sufficiently explicit to operate as an estoppel; that is, does it deny the existence of the ground of invalidity in language *sufficiently express* to throw the holder off his guard (1)? C—Has not the holder such *constructive knowledge* of the facts rendering the bonds invalid, that no recitals, however explicit, could relieve him of the legal presumption that he is actually aware of them (3)? These factors will be delimited in turn.

A—In the absence of any statutory provision, the officers authorized to issue bonds are also impliedly authorized to bind the city by recitals;[36] and it has been held that, where the statute permits the delegation by the officer to a subordinate of the power to issue bonds, the subordinate may make binding recitals, not only as to his own acts, but also as to the acts of his superior.[37] The rightfulness of the officer's tenure is immaterial; a mere de facto occupancy is suffi-

[34] Bigelow on Estoppel, Fifth Ed., p. 570.

[35] Bigelow on Estoppel, Fifth Ed., p. 598.

[36] See the opinion of Judge Gilbert, note 39. Express statutory authority to make recitals is rarely given.

[37] Under an Ohio act which authorizes the county commissioners to appoint road commissioners for a district, responsible to and removable by them, those commissioners to have the power to issue bonds for road improvements, to be attested by the county auditor and at once reported to the county board, the road commissioners in the issuance of the bonds act simply as agents of the county board, and recitals made by them in their own names in the bonds are regarded as having been made by authority of the county board and cover any irregularity in the action of the board as well as of the road commissioners. Rees *v.* Olmsted, 68 C. C. A. 50 (1905).

cient.[38] No express statutory authority, I repeat, is needed to confer *power* to make recitals. But this power rests upon the assumption that the officers issuing the bond are in a position to have peculiar knowledge of the facts surrounding the issuance; and indeed that it is their duty, before issuing the bond, to satisfy themselves that all the conditions have been complied with. The *extent* to which the officer may exercise the power of recital is, accordingly, limited to such matters as are presumed to have been within his ken when he issued the bond. "Whenever [39] it may be inferred from statutory authority that the officers whose duty it was to execute such instruments were to determine for themselves for their own guidance that the preliminary steps had been taken, or that the conditions of fact existed upon which they might proceed, and that they were to act thereupon, their recital of those facts should be conclusive."[40] Within the officers' purview are records and ordinances of the corporation;[41] the amount of taxable property[42] and existing indebtedness, and hence the question as to whether the bonds were within the debt limit;[43] the performance of conditions precedent;[44] the purpose for which the

[38] Waite *v.* City of Santa Cruz, 184 U. S. 302 (1902). But if the person signing as officer was in fact a mere private citizen at the time of signing, the bond is totally invalid, and it is not cured by the fact that at the time of the date in the bond he was in fact such officer. Anthony *v.* Jasper Co., 101 U. S. 693 (1879); Coler *v.* City of Cleburne, 131 U. S. 162 (1889).

[39] City of Santa Cruz *v.* Waite, 39 C. C. A. 106, minority opinion of GILBERT, J. (This case was reversed in the Supreme Court, and that court affirmed the opinion of Judge Gilbert, 184 U. S. 302.) "The fact is not overlooked," says Judge Gilbert, "that incidentally in the opinion in Dixon Co. *v.* Field it was said that: 'where the validity of the bonds depends on an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of the power to issue them, it is necessary to establish that the officers issuing the bonds had lawful authority to make the recitals and to make them conclusive.' What is meant by this language of the court is indicated by the decisions which are cited to sustain it. It was not meant that, before such recitals might bind the corporation, the statute must first in words have defined the powers of municipal officers to decide preliminary questions, and have recited the language of the representations which the bonds might contain. It was meant that * * * [here follows the sentence quoted in the text]."

[40] This is a very different matter from making the issuing officers judges whose conclusion "after the bonds were in the hands of bona fide purchasers it would be too late, even in a direct proceeding, to call in question" (Knox Co. *v.* Aspinwall).

[41] Hackett *v.* City of Ottawa, 99 U. S. 86 (1879); Kearney Co. *v.* Vandriss, 53 C. C. A. 192 (1902).

[42] Bernards Tp *v.* Morrison, 133 U. S. 523 (1890).

[43] Marcy *v.* Tp. of Oswego, 92 U. S. 637 (1875); Sherman Co. *v.* Simons, 109 U. S. 735 (1884); Chaffee Co. *v.* Potter; Gunnison Co. *v.* Rollins; Dallas Co. *v.* McKenzie, 110 U. S. 686 (1884); Rathbone *v.* Kiowa Co., 27 C. C. A. 477 (1897); City of Huron *v.* Second Ward Sav. Bk., 30 C. C. A. 38 (1898); City of Beatrice *v.* Edmiston, 54 C. C. A. 601 (1902); Fairfield *v.* Sch. Dist. of Allison, 54 C. C. A. 342 (reversing 111 Fed. 453) (1902).

[44] Defective notice of election, Anderson Co. *v.* Beal, 113 U. S. 227 (1885); no petition at all, City of Evansville *v.* Dennett, 161 U. S. 434 (1896); railroad not built as required, Stanly Co. *v.* Coler, 190 U. S. 437 (1903).

bonds are to be used;[45] and the question, in regard to refunding bonds, as to whether the bonds to be refunded are valid obligations.[46] It is frequently asserted that recitals of law are not binding. This arises, not from lack of power or knowledge on the part of the issuing officer, but from presumptive knowledge on the part of the purchaser,—since every man is presumed to know the law. But this statement must be taken in a limited sense; it applies only to an affirmance of the constitutionality of the law itself or a recital of its substance. Recitals of mixed law and fact, "legal conclusions," are competent. A recital that "this bond was issued in conformity to law" or "in conformity with the constitution and statutes" is binding.[47]

While it is true that power to make recitals may be implied from power to execute the bonds, yet such implication is negatived by express statutory grant of that authority to another. Where certain officers are expressly required or authorized to make certain recitals, they and none others can make them.[48]

B—The next question is as to the degree of explicitness required of a recital.[49] The recital is, of course, binding if it affirms specifically the performance of the condition upon whose non-performance the defence relies.[50] The recital is equally good if general. It may,

[45] For a bonus, West Plains Tp. *v.* Sage, 16 C. C. A. 553 (1895); to corrupt legislature, Pollard *v.* City of Pleasant Hill, Fed. Cas. 11,253 (1873); for a bonus, Hackett *v.* City of Ottawa, 99 U. S. 86 (1879); to aid a railroad, Risley *v.* Village of Howell, 12 C. C. A. 218 (1894); bonds given away, Wesson *v.* Saline Co., 20 C. C. A. 227 (1896); Sch. Dist. of Sioux City *v.* Rew, 49 C. C. A. 198 (1901).

[46] City of Cadillac *v.* Woonsocket Inst. for Sav., 7 C. C. A. 574 (1893); Ashley *v.* Presque Isle Co., 8 C. C. A. 455 (1893); Waite *v.* City of Santa Cruz, 184 U. S. 302 (1901); Howard *v.* Kiowa Co., 73 Fed. 406 (1896); City of Pierre *v.* Dunscombe, 45 C. C. A. 499 (1901). To the same effect is Graves *v.* Saline Co., 161 U. S. 359 (1896), except that it notes that, if the bonds refunded had been void to such an extent that the municipality would under no circumstances have been bound, it cannot assume the indebtedness by such a recital.

[47] Indeed such is the usual form. Evansville *v.* Dennett, 161 U. S. 434 (1896); King *v.* City of Superior, 54 C. C. A. 499 (1902).

[48] Bonds issued for a greater amount than authorized were held not to be rendered enforceable by a certificate of conformity to the law written on the back of the bond by the *judge* of the county court, when it should have been made by the *court*. "The certificate is not a recital in the bond. It is not the act of the county court, it is not under its seal, nor signed by its clerk. * * * An officer's certificate of a fact that he has no authority to determine is of no legal effect." Daviess Co. *v.* Dickinson, 117 U. S. 657 (1886).

[49] Mere issuance of the bond, without recitals, is not sufficient to estop the municipality from pleading a defective issue, except under such circumstances that the officer's decision is final. Some recital is necessary; and it follows that in the absence or insufficiency of recitals such defective bonds are invalid, even if the purchaser had neither actual nor constructive notice of invalidity. Marsh *v.* Fulton Co., 10 Wall. 676 (1870).

[50] Such as this recital in Hardy Tp. *v.* Brattleboro Sav. Bk., 46 C. C. A. 66 (1901): "This bond is issued and executed under, and by authority of, and in accordance with, the provisions of an act of the General Assembly of the State of Ohio passed on the first day of February, A. D. 1893. And it is hereby certified and recited that all acts, conditions,

for instance, affirm simply "made in pursuance of an act of the legislature of the State of Indiana and ordinances of the city council."[51] Indeed the general recital is more effectual, since it is more comprehensive. A recital such as the one above would cover any violation of a charter or general statute, whether by informality in the steps precedent to issue, or an excessive issue, or wrongful purpose. A recital "issued in conformity to *law*" would seem to cover all statutory and charter requirements; and it has even been held that a recital that "all acts, conditions, and things required to be done precedent to and in the issuing of this bond have duly happened and been performed in regular and due form as required by law" would cover a violation of a constitutional requirement.[52] Such a requirement is not negatived, however, by a recital of conformity to statute.[53] At any rate, a recital of compliance with the constitution will, it is well decided, suffice to estop the municipality to plead noncompliance with constitutional provisions.[54] A recital of conformance with a statute which is unconstitutional is, of course, of no effect.[55] When the statute requires a recital of the performance of certain conditions, a general recital of compliance with the law will not negative non-performance of those conditions.[56] Where bonds recite compliance with a void statute they are not thereby invalidated, if there was sufficient authority under another statute, and that statute was in fact complied with.[57]

C—In order that this recital may operate to estop the municipality

and things required to be done precedent to and in the issuing of said bonds, have been properly done, happened, and performed, in regular and due form as required by law, and that the indebtedness which is refunded by this series of bonds does not exceed in amount the actual amount of outstanding indebtedness, and is a valid, subsisting, and legal obligation of said township, and that neither the indebtedness so refunded nor this series of bonds exceed the statutory or constitutional limitation."

[51] City of Evansville *v.* Dennett, 161 U. S. 434 (1896).

[52] King *v.* City of Superior, 54 C. C. A. 499 (1902).

[53] Buchanan *v.* Litchfield, 102 U. S. 278 (1880); Sch. Dist. *v.* Stone, 106 U. S. 183 (1882); Lake Co. *v.* Graham, 130 U. S. 674 (1889); Sutliff *v.* Lake Co., 147 U. S. 230 (1893).

[54] Chaffee Co. *v.* Potter; Gunnison Co. *v.* Rollins; Fairfield *v.* Sch. Dist. of Allison, 54 C. C. A. 342 (1902) (reversing 111 Fed. 453).

[55] In Concord *v.* Robinson, 121 U. S. 165 (1887), an amendment to the constitution provided that no municipality "shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation," but provided that this prohibition should not apply where such aid had already been voted. Bonds issued thereafter, but authorized theretofore, which recited compliance with the superceded law, were invalid. They should have recited facts putting them within the exception provided by the constitution. Also Cit. Sav. & Loan Ass. *v.* Perry Co. (part 1), 156 U. S. 692 (1895).

[56] Barnett *v.* Denison, 145 U. S. 135 (1892); Clapp *v.* Village of Marice City, 49 C. C. A. 251 (1901).

[57] Anderson Co. *v.* Beal, 113 U. S. 227 (1885); Wilkes Co. *v.* Coler, 180 U. S. 506, 190 U. S. 107; City of Defiance *v.* Schmidt, 59 C. C. A. 159 (1903).

the circumstances must be such as not to present to the holder any constructive notice of invalidity. If from documents whose contents the law presumes him to know he could obtain facts which would show the invalidity of the bonds, then he is not permitted to enforce an estoppel against the municipality. But it is evident that there is no constructive notice of invalidity unless *all* the facts from which the invalidity arises are within the knowledge, actual or presumptive, of the holder. To illustrate: a statute provided that the amount of bonds which a municipality might issue should not exceed a certain percentage of the assessed valuation; the purchaser would have no constructive notice of an over-issue unless he knew, actually or presumptively, not only the assessed valuation of the municipality but also the total amount of its bond issue.[58] A constructive knowledge of the assessed valuation of property gives only the first term and will not be conclusive against him unless he has also notice of the total amount of the issue.

But of what transactions is a holder bound to have knowledge and what documents is he presumed to have inspected? Knowledge of the constitution and general statutes is, of course, presumed.[59] Such knowledge also exists of any record referred to in the statute in such a way as to show that the legislature intended this record to be a criterion by which to decide the question of validity.[60] Such intention need not be expressed in specific terms; a constitutional limitation of indebtedness to "ten per cent of the assessed valuation" of all taxable property is sufficient to send the purchaser to the assessment roll.[61] On the other hand, no one is requried to take notice of any record which is not referred to by the statute authorizing the issue, nor of any record which is not definite, formal, and easily accessible.[62] Neither the minutes of council or board meet-

[58] Chaffee Co. *v.* Potter.

[59] So where the statute required thirty days' notice of an election to authorize bonds, and the bonds bore a date less than thirty days after the promulgation of the statute, there was constructive notice. McClure *v.* Oxford Tp., 94 U. S. 429 (1876). See also United States *v.* Macon Co., 99 U. S. 582 (1878).

[60] Where the constitution provides that "no political or municipal corporation shall be allowed to become indebted * * * to an amount exceeding five per centum on the value of the taxable property within such corporation,—to be ascertained by the last state and county tax lists," the purchaser is bound to have known the contents of these lists. Nesbit *v.* Riverside Sch. Dist., 144 U. S. 610 (1892).

[61] Dixon Co. *v.* Field, 111 U. S. 83 (1884). The facts of this case and a full discussion are given in the text. The proposition in support of which I cite the case here is really the only one decided by it.

[62] A statutory provision that "the amount of the bonds should not be above such a sum as would require a levy of more than one per cent. per annum on the *taxable property* of such township to pay the interest," does not lay down a mode of ascertaining the amount of "taxable property" sufficiently definite to give constructive notice. Marcy *v.* Tp. of Oswego, 92 U. S. 637 (1876); Humboldt Tp. *v.* Long, 92 U. S. 642 (1876); Municipal Trust Co. *v.* Johnson City, 53 C. C. A. 178 (1902).

ings,[63] nor a treasurer's books,[64] nor even the records of municipal ordinances,[65] have these characteristics. Not even a recital in the bond that it is issued in pursuance of a certain resolution or ordinance will charge the purchaser with constructive notice of the tenor thereof.[66]

One other limitation have the federal courts placed upon the scope of constructive notice of invalidity. They hold that there is no such notice unless one of the elements of invalidity appears on the face of the bond itself. For example: The constitution, in the case of *Gunnison County* v. *Rollins*,[67] provided that the county treasurer should keep in a separate book an account of the county's indebtedness. Bonds were issued in excess of the debt limit, but they did not tell,

[63] Waite *v.* City of Santa Cruz; Evansville *v.* Dennett; Fairfield *v.* Ind. Sch. Dist. of Allison, 54 C. C. A. 342 (1902); Haskell Co. *v.* Nat. Life Ins. Co., 32 C. C. A. 591 (1898); Wesson *v.* Saline Co., 20 C. C. A. 227 (1896).

[64] Thus, the total amount of an issue of bonds is not within the constructive knowledge of the purchaser unless such amount is stated on the bond or in some record referred to by statute. No purchaser is required to search a treasurer's records to find it. Compare Chaffee Co. *v.* Potter, 142 U. S. 355 (1892), with Sutliff *v.* Lake Co., 147 U. S. 230 (1893); see also Fairfield *v.* Sch. Dist., 54 C. C. A. 342 (1902); Hardy Tp. *v.* Brattleboro Sav. Bk., 46 C. C. A. 66 (1901); City of Pierre *v.* Dunscombe, 45 C. C. A. 499 (1901).

[65] Hackett *v.* City of Ottawa, 99 U. S. 86 (1879); Pollard *v.* City of Pleasant Hill, Fed. Cas. 11, 253 (1873).

[66] In all the cases cited in notes 63 and 61 the bonds contained such recitals.

[67] 173 U. S. 255 (1899). The decision in this case seems to contradict Sutliff *v.* Lake Co., 147 U. S. 230 (1892), but it will be seen that they are not in opposition and that the opinion on this point in the latter case was mere dictum. Both cases arose in Colorado under the same constitution and statutes. The statute regarding the record of bonded indebtedness was stated most emphatically, and was evidently so stated in order that it might make that record constructive notice of the amount of indebtedness. It provided, "It shall be the duty of the board of county commissioners of each county to make out semi-annual statements * * * they shall have such statements published in some weekly newspaper published in the county * * * and such statements shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest which such debts are drawing, * * * and the statement thus made, in addition to being published as before specified, shall also be entered of record by the clerk of the board of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times." In Sutliff *v.* Lake Co. bonds were issued which, together with previous issues, exceeded the debt limit. Each bond recited the total amount of that issue but not the total amount of bonded indebtedness. The bonds bore a recital of conformity to the statute,—but not to the constitution. The court held rightly that there was no estoppel; but it went on to compare the case with Dixon Co. *v.* Field and Lake Co. *v.* Graham, saying, "The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county [since the bonds themselves recited a total indebtedness which compared with the statement of assessed valuation of property would show that the bonds were unlawful], whereas here two facts are to be so shown, the valuation of the property and the amount of the county debt. But as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds." The real ground for the decision in this case, however, was the omission of any recital of conformity to the constitution. In Gunnison Co. *v.* Rollins, on the other hand, where this recital was made, the estoppel was upheld. Yet the two cases arose

on their face, the total amount of the issue. Here are all the requisites of constructive knowledge, not only of the debt limit but of the total amount of the issue. There is a certain, formal, and easily accessible record of both. Yet the court held that the purchaser had no constructive notice of invalidity since there was nothing on the bonds themselves tending to show that they were unlawful.

The conclusions arrived at in this paper are more or less at variance with certain dicta which have been many times repeated by the courts, but which those same courts have as a matter of practice continually disregarded. I have spoken of the inaccurate way in which ultra vires is appealed to whenever bonds, for one reason or another, have been held invalid. This dictum and others of similar nature are uttered in the case of *Dixon County* v. *Field*[68] and *Lake County* v. *Graham*,[69] and since those cases are typical of others, I will discuss them. In *Dixon County* v. *Field* the constitution provided that no indebtedness might be incurred in aid of a railroad or for other works of public improvement in excess of a certain percentage of the "assessed valuation" of the corporation. The issue of bonds in question exceeded the limit. Each bond recited "This bond is one of a series of $87,000.00 issued * * * under and by virtue of chapter 35 of the general statutes of Nebraska and the constitution of the said state." The court rightly held that the county was not estopped. By applying the principles laid down in this paper it will be seen that the statement on the bond of the total amount of the issue taken together with the "assessed valuation" (of which the statute gave the purchaser constructive knowledge) would give constructive notice that the bond was invalid; and hence the municipality would not be estopped by its recital. And this is the ground upon which the court in *Chaffee County* v. *Potter* justifies this decision. But the opinion speaks otherwise. It says that the recitals are worthless because the officer issuing the bonds had (a) no power to issue the bonds, nor (b) to make the recitals. In order for the recitals to be given effect "there must be," says the court, "authority vested in the officers by law as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence. * * * So if the fact necessary to the existence of the authority [to issue the bonds] was by law to be ascertained, not officially by

under the same constitution and statutes. The amount of indebtedness and the assessed valuation of the property could have been ascertained in the latter case as well as in the former from public records,—yet the court said, "The recital in the bond to the effect that the constitutional limit had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county from saying that the recital was not true."

[68] 111 U. S. 83 (1884).

[69] 130 U. S. 674 (1889).

the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by anyone. * * * Estoppel does not arise except upon matters of fact which the corporate officers had authority by law to determine and certify." This doctrine of lack of power in the issuing officer to make the recitals is merely a variation on the other doctrine that the bonds are absolutely ultra vires. But if recitals under such circumstances are unauthorized, or if such bonds are absolutely ultra vires, how is this case to be reconciled with *Chaffee County* v. *Potter,* and *Gunnison County* v. *Rollins,* where the facts were precisely the same except that in these cases there was no statement on the bond of the total amount of the issue. In these cases the court held that, there being no constructive notice of invalidity, the recital would work estoppel. If "authority to act at all depends upon the actual objective existence of the requisite fact" or if the question of excess is not one "which the corporate officers had authority by law to determine and certify" then it is difficult to see how this authority can be created by want of constructive notice on the part of the purchaser. This inconsistency was noted by JUDGE GILBERT in *City of Santa Cruz* v. *Waite* (see note 39).

Another misconception is found in the case of *Lake County* v. *Graham.* That case, like *Chaffee County* v. *Potter* and *Gunnison County* v. *Rollins,* arose in Colorado, and under the same constitutional and statutory provisions (see note 67). The bonds did not recite compliance with the constitution and hence it was rightly held that there was no estoppel to plead an over-issue. But the court said that the plaintiff would not have been entitled to an estoppel, even if the recital had been explicit, and distinguished between a constitutional and statutory limitation of indebtedness. Said MR. JUSTICE LAMAR, "In this case the standard of validity is created by the constitution. In that standard two factors are to be considered; one the amount of the assessed value, and the other the ratio between that assessed value and the debt proposed. These being exactions of the constitution itself, it is not within the power of the legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts." This dictum was disproved by the later cases of *Chaffee County* v. *Potter* and *Gunnison County* v. *Rollins,* in both of which, under the same constitution and statutes, bonds issued in excess of

the constitutional limit and reciting compliance with the constitution were upheld.

To sum up, then,—the rules which may be deduced from the federal decisions are as follows:

1. No issue of bonds is absolutely ultra vires unless the municipality attempting to issue them is totally without power to issue bonds for any purpose or under any circumstances.

2. Where there is a mere informality in some step prior to the issuance of the bond, and the officer issuing the bond is empowered, expressly or impliedly, to determine[70] whether such step has been duly taken, his decision is absolutely irrebuttable, except on an immediate direct attack, and the bonds issued by him are absolutely valid, with or without recitals.

3. Where facts or conditions precedent to the issue, or the amount and purpose of the bond itself, must have come within the cognizance of the issuing officer (or other person empowered to make a recital) prior to the issuance, and that officer makes in the bond a recital of conformity with the statute (or with the constitution, if the restriction be imposed by the constitution) the municipality is estopped to deny the validity of the bond in the hands of a bona fide holder, unless such holder has constructive notice of invalidity.

4. To constitute constructive notice of invalidity there must be some statement on the bond which, if taken in connection with the statute or some single, formal, and easily accessible record prescribed by the statute as a criterion, would give the purchaser notice that the statutory authority had been exceeded.

To these may also be added:

5. Estoppel will also arise against a municipality from long acquiescence in the validity of bonds, or from receiving and using the proceeds,[71] or paying interest,[72] or other equitable considerations.[73] Such circumstances have the same power of estoppel as would a recital, and are open to the same rebuttals, such as absolute ultra vires or constructive notice of invalidity.[74]

In the five rules just stated the conditions are laid down under which an irregular bond will, in spite of its irregularity, be enforced. Once you have established its enforceability, however, it is on an

[70] Note that there is a distinction between "determine" and "ascertain." No transaction can be determined the fact of which does not rest in judicial inquiry (as the result of an election).

[71] Pendleton Co. *v.* Amy, 13 Wall. 297 (1872); such acquiescence is in the nature of ratification. Supervisors *v.* Schenck, 5 Wall. 772 (1866).

[72] Davis Co. *v.* Huidekoper, 98 U. S. 98 (1878); Clay Co. *v.* Soc. for Sav., 104 U. S. 579 (1881).

[73] Citizens Sav. & Loan Ass. *v.* Perry Co. (part 2), 156 U. S. 705 (1895)

[74] Parkersburg *v.* Brown, 106 U. S. 487 (1882).

equal footing with bonds which are absolutely unexceptionable. Hence it follows that it, like all municipal bonds, is a negotiable instrument. A bona fide holder "is entitled to transfer to a third party all the rights with which he is vested, and the right so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defences existing against the paper."[75]

In brief, the theory of this paper is that, when the question of the validity of municipal bonds was first presented, the court held that irregularities of every sort were cured by the decision of the officers issuing them, and that this decision might be attacked only in a direct proceeding begun before the bonds had passed out of the hands of the first taker. Later, cases came up in which the defects in issuance were graver, or the equities of the holder less strong, and the court, desiring to modify its former holding without reversing it, held that in such cases there was no authority to issue. This, however, leads to a conclusion utterly untenable,—that authority to issue is affected by any equity or want of equity on the part of the holder. These later cases are, then, in reality decided not on the basis of authority or lack of authority,—but on the basis of estoppel (and the courts in most of the recent cases have so stated their ground). The early doctrine of a decisive judgment on the part of the issuing officers is limited to cases of irregularity in some precedent formality; and as to graver defects, defects which are entirely beyond the judgment of a tribunal, the recital of the officers operates merely by way of estoppel, rebuttable by constructive notice.

CHARLES L. DIBBLE.

MARSHALL, MICHIGAN.

[75] Gunnison Co. *v.* Rollins; Rathbone *v.* Kiowa Co., 27 C. C. A. 477 (1897). It might seem at first sight that the early cases of Moran *v.* Miami Co. and others (in which the holders were allowed to recover, even though they had actual knowledge of defects) might be explained in the same way; that is, that the holders in those cases were permitted to recover because they were transferees of bona fide holders. But they cannot be so explained for several reasons. First, the decisions themselves do not base their contention that the bonds are valid on the intervention of bona fide holders. "When the contract had been ratified and affirmed, and the bond issued and delivered to the railroad company in exchange for stock, it was then too late to call in question the fact determined by the common council." Bissell *v.* City of Jeffersonville, 24 How. 287 (1860). Secondly, in a case where railroad aid bonds were wrongfully issued, and the purchaser bought *direct from the railroad* and there was evidence to show that the purchaser himself knew of the defects, still the court refused to declare the bonds in his hands invalid, and said, "The legal holders can in no event have any concern, even if it be admitted that they had notice of irregularities when they bought, as all of them relate to circumstances contradictory to the declarations on the face of the bonds." Moran *v.* Miami Co., 2 Black, 722 (1862). So in these early cases the intervention of a bona fide holder was not the ground of the decisions.